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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 97

ELIAS MILLER, PAUL MILLER, ANNA MILLER and HELEN MILLER, and ELIAS MILLER and PAUL MILLER, and Executors of the Estate of GEORGE MILLER, Deceased,
Petitioners,

vs.

IRVING SULMEYER, Trustee in Bankruptcy of the Estate of DELCON CORPORATION, Bankrupt.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Motion of Petitioners for Leave to Append to Their Reply and Supplemental Brief Article of Professor MacLachlan of Harvard Law School.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 981

ELIAS MILLER, PAUL MILLER, ANNA MILLER and HELEN MILLER, and ELIAS MILLER and PAUL MILLER, and Executors of the Estate of GEORGE MILLER, Deceased,

Petitioners,

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IRVING SULMEYER, Trustee in Bankruptcy of the Estate of DELCON CORPORATION, Bankrupt.

Respondents.

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Motion of Petitioners for Leave to Append to Their Reply and Supplemental Brief Article of Professor MacLachlan of Harvard Law School.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully move for leave to append to their reply and supplemental brief the articles of Professor MacLachlan of Harvard Law School at pages 330 to 333, inclusive, in his Bankruptcy Handbook Series published in 1956.

This motion is made for the following reasons:

1. The attention of petitioners' counsel to this article was drawn the first time following the filing of petitioners' reply and supplemental brief; and for this reason said article has not been referred to in petitioners' reply and supplemental brief.

2. The comments of Professor MacLachlan in said appended article would be helpful to this Court in its resolution of the principal questions presented for review in their certiorari petition *upon the present record.*

3. Said comments reinforce petitioners' major contention that the abstract principles expounded in *Moore v. Bay* (284 U. S. 4, 52 S. Ct. 3, 76 L. Ed. 133) merit critical reconsideration by this Court in their application to the present record; and for the reasons set forth in the certiorari petition the abstract and generalized principles set forth in the *Moore* decision must be fully briefed and orally argued in the light of the equities presented by the present record.

Respectfully submitted,

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APPENDIX.

Comment of Professor MacLachlan on Moore v. Bay.

284. An ill-considered decision has established the law to the effect that a transfer vulnerable in minor part only outside of bankruptcy becomes completely invalid in the event of bankruptcy. Recoveries are properly held to be general assets of the bankruptcy estate.

The scope of section 70e is, however, clouded by one of the most glaring misconstructions to be encountered in the history of Anglo-American law. The result must be attributed in large part to the fact that the decision was made on reversing a judgment of the Circuit Court of Appeals without the benefit of argument on the part of the respondent. Mr. Justice Holmes,[1] then over 90 years

[1] In view of the high regard in which this Justice is held, it may seem graceless to record the opinion that in commercial law and several related fields he made a disproportionate number of decisions open to challenge as technically unsound or unrealistic. Some of these decisions have been repudiated by the court: Francis v. McNeal, 228 U. S. 695, 33 S. Ct. 701 (1913); Flexner v. Farson, 248 U. S. 289, 39 S. Ct. 97 (1919); Baltimore & O. R. Co. v. Goodman, 275 U. S. 66, 48 S. Ct. 24 (1927); some by Congress: United States v. Johnson, 221 U. S. 488, 31 S. Ct. 627 (1911); Davis v. Pringle, 268 U. S. 315, 45 S. Ct. 549 (1925); Sexton v. Kessler & Co., 225 U. S. 90, 32 S. Ct. 657 (1912). Others remain to require undesirable results which cannot be reconciled with more generally accepted principles: Die Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U. S. 517, 47 S. Ct. 166 (1926); United States Fidelity & Guaranty Co. v. Woodridge, 268 U. S. 234, 45 S. Ct. 489 (1925); Eaton v. Boston Safe Deposit & Trust Co., 240 U. S. 427, 36 S. Ct. 391 (1916). Concerning the abandonment of the Flexner rule, see Sugg v. Hendrix, 142 F. 2d 740, 742 (C. C. A. 5th, 1944). His fine brief literary style helped him to evade or to elide brilliantly the considerations that should have controlled the case. The force of his personality may well have helped him to lead his colleagues as well as to dominate the procession of brilliant young men who acted as his clerks. Those who ignore his technical decisions and attack his philosophy attack him where his reputation rests upon a far firmer foundation. One

old, stated the facts in two sentences and the procedure below in one, and the law in five more. The opinion thoroughly concealed the critical point of the case. An examination of the record leads to the conclusion that the Court did not grasp the point and did not understand the effect of its decision. The Court said: "The bankrupt executed a mortgage of automobiles, furniture, showroom, and shop equipment that is admitted to be bad as against creditors who were such at the date of the mortgage and those who became such between the date of the mortgage and that on which it was recorded, there having been a failure to observe the requirements of the West's Ann. Civil Code of California, Par. 3440 (a recording act). The question raised is whether the mortgage is void also as against those who gave the bankrupt credit at a later date, after the mortgage was on record." This is a serious misstatement. The record shows that there were two questions, but this was not a proper statement of either. The questions were: (1) whether the trustee in bankruptcy could appropriate all the mortgaged property or whether his right to attack it was measured by the claims of creditors who could attack it. (2) Assuming that his recovery was the more limited one (as all previous cases had assumed), was his recovery to inure only to the direct benefit of the creditors who could attack or did it become a general asset of the estate?

The Court then said: "The Circuit Court of Appeals affirmed an order of the District Judge giving the mortgage priority over the last creditors. (45 F. 2d 449.)"

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of his earliest opinions upon the United States Supreme Court, his dissent in Northern Securities Co. v. United States, 193 U. S. 197, 24 S. Ct. 436 (1914), suggests searching thought, but both the theory and the result he propounded were properly rejected by the Court both then and later.

This obscures the issues. The courts below soundly held (1) that the trustee could claim an interest in the mortgaged property measured by the claims of the creditors who could claim priority over the mortgage, and (2) that his recovery became general assets.

The Court then said: "Whether the court was right must be decided by the Bankruptcy Act, since it is superior to all state laws upon the subject. Globe Bank v. Martin, 236 U. S. 288, 298, 35 S. Ct. 377." This is a misleading oversimplification. The Bankruptcy Act here expressly refers back to state law for the basis of the trustee's right.

The next sentence of the opinion reads: "The trustee in bankruptcy gets the title to all property which has been transferred by the bankrupt in fraud of creditors or which prior to the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him. Act of July 1, 1898, c. 541, sec. 70." This is comparatively innocuous. The trustee cannot prevail under section 70a, however, and a statement of its terms here is only a distraction. The reference to fraud on creditors, section 70a(4), adds to the distraction, for as we have seen, this clause is not self-executing, speaks only as of the date of the petition, and gives the trustee less effective rights than section 67d (then section 67e), which is not here in issue.

The Court then said: "By section 67 . . . claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate." The reference to section 67 comes closer to giving a basis for the decision than any other part of the opinion. The subdivision was later dropped from section 67 in the

Chandler Act revision, because (with the possible exception of this case) it had never been used to cover any ground not more effectively covered by other provisions. On its face it said that claims which were not valid liens against creditors in general were not to be valid liens against the bankrupt estate. It did not say that a claim which was invalid against any creditor should be completely invalid against the estate regardless of the amount of the claim of the creditor entitled to prevail over it. Such a construction might amount to a forfeiture of a large claim on account of trivial flaw. No hint of such construction had ever appeared.

The Court then said: "The rights of the trustee by subrogation are to be enforced for the benefit of the estate." The source of this statement is uncertain. No such provision was contained in section 67a. There was a provision for subrogation in section 67c then in force in relation to liens by legal proceedings, but that was inapplicable. If the Court was thinking of section 70e, which was really the basis for the trustee's recovery, it was awkwardly but correctly deciding the second point at issue. The trustee asserting a creditor's right to avoid a transfer under section 70e is in effect subrogated to that right. It is preferable to hold that he recovers for the direct benefit of the estate, although it would not be stultifying for him to recover a substantial interest for a large creditor when there are other assets in the estate, for the resulting diminution of that creditor's claim would go to increase dividends for all other creditors.[2] Never-

[2] If there are no other assets, the creditors other than the one having the right of avoidance will gain nothing by a suit. Assume a $1,000 transfer voidable by "C" a creditor with a $1,000 claim, $9,000 other creditors, and $5,000 other assets. "C" will get a

theless, in a large portion of cases it would not pay the trustee to litigate for such an indirect benefit.

The opinion concluded with the final statement: "The Circuit Courts of Appeals seem generally to agree, as the language of the Bankruptcy Act appears to us to imply very plainly, that what is thus recovered for the benefit of the estate is to be distributed in 'dividends of an equal percentum (. . .) on all allowed claims, except such as have priority or are secured.' Bankruptcy Act, sec. 65. In re Kohler (C. C. A.), 159 F. 871; Muller v. Warner (C. C. A.), 11 F. 2d 62; Campbell v. Dalbey (C. C. A.), 23 F. 2d 229; Cohn v. Schultz (C. C. A.), 43 F. 2d 340; Globe Bank & Trust Co. v. Martin, 236 U. S. 288, 305, 35 S. Ct. 377."[3] The Circuit Courts of Appeals did not agree. (Mullen v. Warner, *supra*, deciding in 1923, that recovery was not to be for the direct benefit of the particular creditor only, gave rise to a split of authority[4] which afforded a legitimate reason and apparently the only legitimate reason for bringing the case to the Supreme Court on certiorari.) The judgments of the Circuit Court of Appeals and the District Court in the Moore case were now reversed, the decision being understood to authorize the trustee in bankruptcy to appropriate the entire property free of the mortgage.

$500 dividend if there is no suit, a $600 dividend if the recovery is for the direct benefit of the estate, as against his full $1,000 under the other rule. The other creditors will get $4,500 if no suit, $5,000 if the recovery goes to "C" eliminating his participation in the other assets, and $5,400 if the recovery is for the direct benefit of the estate. The more prosperous the estate the more tolerable a suit for the direct benefit of "C" only.

[3]Followed on this point: In re L. H. Lewis Co., 62 F. 2d 353 (C. C. A. 5th, 1932), and many other cases.

[4]*Contra*: American Trust & Savings Bank v. Duncan, 254 Fed. 780 (C. C. A. 5th, 1918).

An unfortunate circumstance that contributed to this extraordinary result was the absence of any evidence in the record to show what was at stake in dollars and cents. Perhaps the claims of the creditors entitled to disregard the mortgage covered most of the value of the property. Perhaps that is why the mortgagee, after winning in the District Court and the Circuit Court of Appeals, did not think it worth while to go to the expense of defending his interest in the Supreme Court (especially since almost any bankruptcy lawyer would have advised him that the petition of the trustee for a greater recovery was altogether untenable). There is no evidence that the trustee here invalidated a large mortgage through asserting the claim of only a small creditor.